

ST 98-32

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS

v.

RICHARD "WINKEN", ALAN "BLINKEN",  
and the ESTATE of WAYNE "NOD",  
responsible officers of "Sleepytime, Ltd."  
Taxpayers

Docket No. 96-ST-0000  
NPL Nos. 0007 (A. Blinken)  
0008 (W. Nod)  
0009 (R. Winken)

John E. White,  
Administrative Law Judge

**RECOMMENDATION FOR DISPOSITION**

**Appearances:** John Flynn appeared for Richard "Winken"; Richard Manning appeared for Alan "Blinken" and for the Estate of Wayne "Nod"; Alan Osheff appeared for the Illinois Department of Revenue.

**Synopsis:**

This matter arose after the Illinois Department of Revenue ("Department") issued a Notice of Penalty Liability ("NPL") to each of the three individuals named above regarding the unpaid corporate tax liability of "Sleepytime", Limited ("Sleepytime"). All three individuals protested the NPL's, and requested a hearing. Following Wayne "Nod's" death, his estate was substituted as a named party.

A hearing was held on taxpayers' protests at the Department's offices in Chicago. Pursuant to a pre-hearing order, the parties identified the issues to be resolved at that hearing as "which of the parties, if any were the responsible parties and if there was a responsible party or parties[,] were those parties willful in not remitting the taxes". I have considered the evidence admitted at hearing and I am including within this recommendation findings of fact and conclusions of law. I recommend that the penalty issued to Richard "Winken" be upheld regarding assessments incurred during the period from 3/91 through 8/91. I recommend the penalties assessed against Alan "Blinken" and the estate of Wayne "Nod" be upheld in full.

**Findings of Fact:**

**Facts Regarding “Sleepytime’s” Ownership, “Sleepytime’s” Operations, and the Underlying Corporate Tax Liability:**

1. “Sleepytime” was owned, 80/20, by Wayne “Nod” and Alan “Blinken”, who are brothers. “Winken” Ex. No. 1, pp. 2, 8, 17;<sup>1</sup> Hearing Transcript (“Tr.”) pp. 179-80 (testimony of Alan “Blinken” (“A. Blinken”)).
2. “Sleepytime” was engaged in the business of selling, servicing, renting and leasing material handling equipment and aerial work platforms. “Winken” Ex. No. 1, pp. 1, 4, 50-52.
3. Wayne “Nod” was the president of “Sleepytime” prior to and during the period at issue. “Winken” Ex. No. 1, pp. 8, 17. He was also a director for “Sleepytime”. “Winken” Ex. 5 (affidavit prepared by Wayne “Nod” regarding “Sleepytime’s” federal withholding tax penalty); Tr. p. 206 (A. “Blinken”).
4. Alan “Blinken” was the vice-president for “Sleepytime” prior to and during the period at issue, and had held that office since the late 1970’s. “Winken” Ex. No. 1, pp. 8, 17; “Winken” Ex. No. 6; Tr. pp. 180 (A. “Blinken”). He was also a director for “Sleepytime”. “Winken” Ex. No. 6.
5. Richard “Winken” was the secretary of “Sleepytime” prior to and during the period at issue. Tr. pp. 304-05 (testimony of Richard “Winken” (“Winken”). “Winken” was also a “Sleepytime” director, and its general manager. “Winken” Ex. Nos. 5-6; Tr. pp. 182 (A. “Blinken”), 139 (testimony of James “Ketchup” (“Ketchup”), “Sleepytime’s” service manager).
6. “Gil Hodges” (“Hodges”), a CPA, was employed as “Sleepytime’s” comptroller from approximately August 1990 to April 1992. Tr. p. 26 (Hodges); *see also* “Winken” Ex. No. 1, p. 16.
7. Most of the penalty assessed is attributable to unpaid corporate tax liabilities arising during the months of 3/91 to 9/91. Department Ex. Nos. 1-3 (as of 10/19/94, “Sleepytime’s” unpaid tax and late filing penalties for the months of 3/91 through 9/91 equaled \$94,438.54, versus \$9,157.34 in similar liabilities for other periods).

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<sup>1</sup> “Winken” Ex. No. 1 is a group exhibit consisting of documents filed, and a transcript of testimony offered, pursuant to “Sleepytime’s” voluntary petition for relief under chapter 11 of the bankruptcy code, which petition was docketed under number 91B00000 in the United States Bankruptcy Court, Northern District of Illinois.

8. Mary “Quitecontrary”, a “Sleepytime” employee, prepared the sales tax returns filed regarding the period from 1/91 to 9/91. “Blinken” Ex. Nos. 1-9; Tr. pp. 171-73 (testimony of Mary “Quitecontrary” (“Quitecontrary”)).
9. “Quitecontrary” prepared the returns by reviewing “Sleepytime’s” books and records to identify the entries to be made on the returns. Tr. pp. 170-71 (“Quitecontrary”).
10. Each of the returns “Quitecontrary” prepared showed the amount of use tax “Sleepytime” had collected from its customers regarding taxable sales of tangible personal property, either from sales at retail or from transfers incident to its sales of service. “Blinken” Ex. Nos. 1-9 (*see* ¶¶ 2, 4b and 9 on page 1 of each return, and ¶¶ 1-2 on page 2 of each return). The amounts “Sleepytime” reported for those months are as follows:

<b>Month</b>	<b>Tax “Sleepytime” Collected From Its Customers</b>	<b>“Sleepytime’s” Reported ROT Liability</b>
3/91	\$ 8,731.11	\$ 8,578.32
4/91	8,429.01	8,281.50
5/91	14,993.71	14,731.32
6/91	8,175.22	8,032.15
7/91	7,364.10	7,235.23
8/91	11,784.73	11,578.50
9/91	3,601.75	3,538.72
<b>TOTAL</b>	<b>\$ 63,079.63</b>	<b>\$ 61,975.74</b>

“Blinken” Ex. Nos. 3-9;<sup>2</sup> “Winken” Ex. No. 1, p. 40 (listing \$61,975.74 as the amount “Sleepytime” owed the Department).

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<sup>2</sup> The tax “Sleepytime” collected from its customers exceeded the amount of “Sleepytime’s” tax due as shown on lines 11, 21 and 26 of the returns ultimately filed because those returns took into account the 1.75% discount available to taxpayers as reimbursement for the costs associated with keeping books and records, making them available for audit, etc. “Blinken” Ex. Nos. 3-9 (page 1 of each return, ¶¶ 10-11); 35 ILCS 120/3 (*formerly* Ill. Rev. Stat. ch. 120, ¶ 442 (1991)); 86 Ill. Admin. Code § 130.501(b)(4) (discount “available when the tax is remitted with a return that is filed when due under the Act, *but is not available in any case in which the tax is paid late* (with or without a return, and whether formally assessed by the Department or not)”) (emphasis added). For each return filed regarding the periods covered by the NPL’s issued in this case, the amount reported on line 9 of each return equaled the amount of the tax “Sleepytime” collected from customers.

The Department erred slightly in taxpayers’ favor when it calculated “Sleepytime’s” unpaid corporate liabilities, and thereby, the penalties assessed here. The error occurred when the Department calculated as the “tax” due for each period the amount “Sleepytime” reported on line 11 of its returns (i.e., *after* the 1.75% discount was taken into account)

11. “Sleepytime” deposited the tax monies it collected from its customers into its bank account, and funds from that account were then used to pay “Sleepytime” salaries and other corporate obligations. Tr. pp. 365-66 (“Hodges”); *see also* “Winken” Ex. No. 1, p. 16; “Winken” Ex. No. 1, pp. 18 (salaries paid to the “Blinken”s during the year prior to the filing of bankruptcy, part of which salaries were paid during the delinquent period), 12, 24-42 (schedule of “Sleepytime’s” payments to “Sleepytime” insiders and to creditors, prepared for bankruptcy court).
12. “Quitecontrary” ordinarily signed “Sleepytime’s” sales tax returns as the preparer, and, during the first two months of 1991, “Hodges” signed the returns as the representative of the taxpayer. *See* “Blinken” Ex. Nos. 1-9; Tr. pp. 27-28 (“Hodges”), 171-73 (“Quitecontrary”). The return filed regarding the month of 8/91 was not signed by the preparer, nor does it reflect the date it was prepared. “Blinken” Ex. No. 8.
13. Beginning with the return for the period of 3/91 “Hodges” stopped signing “Sleepytime’s” sales tax returns, because he “wasn’t really sure what the monetary situation was at the time.” Tr. p. 31 (“Hodges”).
14. In March of 1991, “Hodges” had written a letter to the Department in which he detailed the amounts of penalties, interest and lost discounts regarding delinquent “Sleepytime” returns regarding the months of October and November 1990. “Blinken” Ex. No. 10 (March 21, 1991 letter from “Hodges” to the Department); “Blinken” Ex. No. 3 (3/91 return prepared by “Quitecontrary” on or about 4/25/91). Two months earlier, in January 1991, both “Hodges” and “Winken” signed a check payable to the Department regarding “Sleepytime’s” delinquent tax liabilities regarding the month of September 1990. “Blinken” Group Ex. No. 9-1.

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instead of the amount reported on line 9 thereof (the tax due on its receipts). “Blinken” Ex. Nos. 3-9 (pp. 1-2 of each return). For example, for the month of March 1991, the Department’s NPLs identified the tax due as \$8,578, and the penalty due as \$1011, for a total of \$9,589. Department Ex. No. 1, p. 1. For some reason, the 10% late filing penalty was multiplied by the amount of tax that would have been due had “Sleepytime” filed and paid on time, and the discount was then added to the erroneously calculated penalty. *Compare* “Blinken” Ex. No. 3 (return for 3/91) *with* Department Ex. No. 1 (\$1011 penalty for 3/91 = \$858 (10% of \$8,578) + \$153 (the discount claimed)). “Sleepytime’s” taxes and penalties for March 1991 should have been identified as, respectively, \$8,731 and \$873, for a total of \$9604, excluding statutory interest. “Blinken” Ex. No. 3. The Department did not seek to correct its error at hearing.

15. When “Hodges” decided to stop signing “Sleepytime’s” Illinois sales tax returns, he had personal knowledge that “Sleepytime” recently had not been filing and paying, in a timely manner, the tax due as shown on the returns he signed and whose preparation he supervised. *See* “Blinken” Group Ex. No. 9-1; “Blinken” Ex. No. 10; “Winken” Ex. No. 4.
16. Sometime during or before 1991, a “Sleepytime” vehicle was involved in a fatal traffic accident, which subjected “Sleepytime” to a claim or action for possible tort liability in excess of its insurance limits. “Winken” Ex. No. 6, p. 2; Tr. pp. 198 (A. “Blinken”), 350-51 (“Hodges”).
17. For a period of time before and during 1991, “Sleepytime” had cash flow problems. *See* Tr. pp. 31 (“Hodges”), 130, 144, 147-48 (“Ketchup”), 184 (A. “Blinken”).
18. “Winken”, Alan “Blinken” and Wayne “Nod” all had check writing authority for “Sleepytime”. “Winken” Ex. No. 6, p. 3. Before a “Sleepytime” check was drawn, someone with check writing authority for “Sleepytime” had to approve a check request, which request indicated the name of the payee, the amount and the purpose for the check. “Winken” Ex. No. 2 (copies of “Sleepytime” check request form); Tr. pp. 78-79 (“Hodges”), 129-30, 140-41 (“Ketchup”).
19. “Sleepytime’s” fiscal year ended on August 31. “Winken” Ex. No. 1, p. 11; Tr. pp. 55-56 (“Hodges”). “Sleepytime’s” books and records did not balance during the course of 1990, or during the course of 1991. Tr. pp. 54-56, 92-98 (“Hodges”). “Hodges” was able to reconcile “Sleepytime’s” books only after “Sleepytime’s” fiscal year was complete. *See* Tr. pp. 116-18 (“Hodges”).
20. Shortly before October 1991, Wayne “Nod” directed “Hodges” to complete an investigation of “Sleepytime’s” then-current assets and liabilities. Tr. pp. 56-57 (“Hodges”). That direction coincided with “Hodges” attempt to reconcile “Sleepytime’s” books for fiscal year ending in 1991. *Compare id with* Tr. pp. 116-18 (“Hodges”).
21. During the course of “Hodges” investigation and reconciliation, he claimed to have first discovered that the checks he asked to be drawn to pay “Sleepytime’s” sales tax liabilities for periods including 3/91 to 7/91, as well as checks drawn to pay other “Sleepytime” debts, had not been sent out to the Department or to the other named payees. Tr. pp. 56-58, 100 (“Hodges”).

22. On or about October 4, 1991, a meeting was held at “Sleepytime’s” office. Present were Wayne “Nod” and Alan “Blinken”, Richard “Winken”, Bob “Hodges”, and other “Sleepytime” personnel. “Winken” Ex. Nos. 3, 5, 6.
23. During that meeting, “Hodges” reported his determinations regarding “Sleepytime’s” financial status, including its unpaid Illinois tax debts/liabilities, to those assembled. “Winken” Ex. No. 3; “Winken” Ex. Nos. 5-6 (p. 2, question 15 of each exhibit); *see also* Tr. pp. 82-85, 124-25 (“Hodges”). At that time, “Hodges” also reported that “Sleepytime” had approximately \$45,000.00 in corporate funds immediately available. Tr. pp. 124-25 (“Hodges”).
24. Following that meeting, Wayne “Nod” and Alan “Blinken” hired, and gave most of “Sleepytime’s” available cash to, counsel as a retainer to file a petition for relief under chapter 11 of the United States Bankruptcy Code. “Winken” Ex. No. 1, p. 7; “Winken” Ex. Nos. 5-6 (p. 2, question 15 of each exhibit); “Winken” Ex. No. 1,
25. “Sleepytime’s” chapter 11 plan for reorganization (*see* “Blinken” Ex. No. 14) was rejected by “Sleepytime’s” creditors. Tr. p. 198 (A. “Blinken”).
26. During the same approximate period “Sleepytime” was not paying its Illinois tax debts/liabilities, “Sleepytime” also incurred approximately \$86,000 in unpaid federal withholding taxes. *See* “Winken” Ex. Nos. 5-6; Tr. p. 206 (A. “Blinken”). Wayne “Nod” and Alan “Blinken” paid “Sleepytime’s” federal income tax liability. Tr. p. 213 (A. “Blinken”).

**Facts Regarding “Winken’s” Responsibilities, and His Activities Relative to “Sleepytime’s” Unpaid ROT Liability and Unpaid Use Tax Debt:**

27. “Winken” handled many of “Sleepytime’s” day-to-day operations. *See* Tr. pp. 88-89 (“Hodges”), 144-45 (“Ketchup”).
28. “Winken” supervised the parts and service departments for “Sleepytime”, and he was the person who would approve check requests prepared by personnel in those departments. Tr. pp. 129, 142-43 (“Ketchup”).

29. “Winken” also supervised “Hodges” activities to a certain extent, and “Winken” established the procedure “Hodges” followed regarding the preparation, completion and mailing of “Sleepytime’s” sales tax returns. Tr. pp. 29, 89 (“Hodges”). That procedure was as follows: “Hodges” first reviewed the “Sleepytime” returns after they were prepared by “Quitecontrary” (Tr. pp. 27-29, 349 (“Hodges”)); “Hodges” would then request that a “Sleepytime” check to be drawn to pay the tax due (Tr. p. 349; *see also, e.g.*, “Winken” Ex. No. 2 (check request form prepared by “Hodges”)); after the check was drawn, “Hodges” sent the completed return and the prepared check to “Winken” or to Wayne “Nod” to be signed and mailed to the Department. Tr. pp. 28-29, 38, 89, 349, 361-62 (“Hodges”).
30. During the period “Hodges” was signing “Sleepytime” sales tax returns, he would give the returns and the “Sleepytime” checks drawn to pay the tax due to “Winken”. Tr. pp. 28-29, 88-89 (“Hodges”).
31. On the first day of hearing, and for the period during which “Hodges” stopped signing “Sleepytime” sales tax returns, “Hodges” could not recall whether he gave the completed sales tax returns and checks to “Winken” or to Wayne “Nod”. Tr. pp. 31-38 (“Hodges”). “Hodges” assumed that he gave the returns to Wayne “Nod” because Wayne “Nod” signed them. Tr. p. 38 (“Hodges”); *but see* Tr. p. 360 (on the second day of hearing, “Hodges” believed that he gave the completed returns, and the checks drawn to pay them, to “Winken” until the October 4<sup>th</sup> meeting, after which he started to give the returns and checks to Wayne “Nod”).
32. When eventually filed, the “Sleepytime” returns prepared regarding the months of 3/91 to 9/91 bore the signature of Wayne “Nod”, which signature was dated 12/9/91. “Blinken” Ex. Nos. 3-9; Tr. p. 176 (“Quitecontrary”).
33. On the returns dated 12/9/91, Wayne “Nod”’s signature was signed over another signature, which had been partially erased or obscured. *See* “Blinken” Ex. Nos. 3-8.
34. The signature that had been partially erased or obscured on those returns was the signature of Richard “Winken”. *Compare* “Blinken” Ex. Nos. 3-8 (taxpayer’s signature boxes) *with* “Blinken” Ex. Nos. 9-1 to 9-9 (copies of “Sleepytime” checks and/or check payment records regarding checks written and

issued to the Department, and bearing “Winken”’s signature);<sup>3</sup> Tr. pp. 290-303 (“Winken” acknowledging that he signed the “Sleepytime” checks and/or check payment records admitted as part of “Blinken” Group Exhibit 9-1 to 9-9); *see also* 1601 South Michigan Partners v. Measuron, 271 Ill. App. 3d 415, 417-18 (1<sup>st</sup> Dist. 1995) (witness, jury or finder of fact may compare signatures in the record to determine whether they are the same); Tr. pp. 352-54 (“Hodges” specifically recalling that he retrieved checks that had been drawn on “Sleepytime’s” account, but had not been issued to the payees, from “Winken”, but could not specifically recall retrieving such checks from anybody else).

35. At hearing, “Winken” denied signing any sales tax returns for “Sleepytime” (Tr. p. 288), although he conceded that he signed “Sleepytime” checks made payable to the Department when they were presented to him for signature. Tr. pp. 291-302, 324-25 (“Winken”).
36. “Winken” also denied knowing that some of the “Sleepytime” checks drawn and made payable to the Department, which he signed, were for delinquent tax liabilities, even though memos written on those checks, or check records, indicated that, e.g.: the \$16,716.24 check drawn on January 15, 1991 was for “Sleepytime’s” September ’90 monthly liability (“Blinken” Group Ex. No. 9-1); the \$10,000 check drawn on February 15, 1991 was “on account” for “Sleepytime’s” October and November ’90 monthly tax liabilities (“Blinken” Group Ex. No. 9-4; “Blinken” Ex. No. 10, p. 2); the \$2,365 check drawn on March 11, 1991 was for “Sleepytime’s” “Sept. 1990 Sales Tax Penalty” (“Blinken” Group Ex. No. 9-6); the \$5,880 check drawn on March 21, 1991 was for another “sales [tax] penalty” (“Blinken” Group Ex. No. 9-7); and that the \$11,690.65 check drawn on May 17, 1991 was for “Sleepytime’s” January 1991 monthly tax liability (“Blinken” Group Ex. No. 9-8). “Winken” claimed that he wouldn’t look at the memos written on the checks he signed. Tr. p. 304 (“Winken”).

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<sup>3</sup> The distinctive “R” and the tail of the “n” in Richard “Winken” signature are visible in each of the copies of the returns admitted as “Blinken” exhibit numbers 3 through 8. On “Blinken” exhibit number 4, moreover, the handwritten letters “Se” are visible after the “n” tail, in the place where the signer would identify his status within the company. “Blinken” Ex. No. 4. At the time that return was prepared, “Winken” was still “Sleepytime’s” secretary. *See* Tr. pp. 304-05 (“Winken”). The presence of “Winken”’s signature *underneath* the signature of Wayne “Nod” shows that “Winken” had custody or possession of those returns *before* Wayne “Nod” signed them.



37. “Winken” would refuse to sign check requests, and would hold (i.e., he would not mail or otherwise issue) checks drawn on “Sleepytime” account, when there was not enough money in “Sleepytime’s” account to cover the checks. Tr. pp. 130, 133-34 (“Ketchup”); *see also*, Tr. p. 288 (“Winken” testified that he never refused to sign a check for paying sales taxes *when there was money in the bank*, and that he never held any checks for the payment of sales taxes *when he knew there was money in the bank*).
38. “Hodges” gave “Winken” “Sleepytime’s” Illinois tax returns, and the checks drawn to pay those returns, on or about the time such returns were due. Tr. pp. 28-29, 38, 89, 349, 360 (“Hodges”).
39. Thereafter, “Winken” did not mail those returns and checks in a timely manner. “Winken” Ex. No. 4 (every Illinois ROT return filed from July 1990 through October 1991). Specifically, the returns filed regarding July through November of 1990 were filed on or about 1/15/91, the return for 12/90 was filed on or about 2/11/91, the return for 1/91 was filed on or about 5/17/91, the return for 2/91 was filed on or about 6/14/91; and the returns for 3/91 through 10/91 were not filed until December 1991. *Id.*
40. “Winken” did not mail those returns and checks timely because he knew or believed that “Sleepytime” did not have funds available to honor the checks drawn. *See* Tr. p. 288 (“Winken”); “Blinken” Ex. Nos. 3-8; *see also* Tr. pp. 130, 144, 147 (“Ketchup”).
41. “Winken” was, until early October 1991, the “Sleepytime” officer and employee delegated and authorized to sign and mail “Sleepytime’s” monthly sales tax returns and the checks drawn to pay them. *See* “Blinken” Group Ex. Nos. 9-1 to 9-9; “Blinken” Ex. No. 10.

**Facts Regarding Wayne “Nod’s” Responsibilities, and His Activities Relative to “Sleepytime’s” Unpaid ROT Liability and Unpaid Use Tax Debt:**

42. Wayne “Nod” signed the returns filed with the Department during the applicable periods. “Blinken” Ex. Nos. 3-9; “Winken” Ex. No. 4.
43. Wayne had actual knowledge that “Sleepytime” collected tax from its customers, and that such taxes were not remitted to the Department by “Sleepytime”. “Blinken” Ex. Nos. 3-9 (Wayne signed the returns on which “Sleepytime’s” collection were reported); “Winken” Ex. Nos. 1, 3, 5 (question 11); *see also* “Blinken” Ex. Nos. 11-1 to 11-7 (“Sleepytime” general ledger schedules prepared regarding the

applicable period showing Illinois sales taxes (actually, use or service use taxes) collected from “Sleepytime’s” customers); Tr. pp. 117, 122-24 (“Hodges”).

44. After Wayne had actual knowledge of “Sleepytime’s” Illinois tax debts/liabilities, Wayne and Alan decided to turn over almost all of “Sleepytime’s” available cash as a retainer to attorneys for representation regarding “Sleepytime’s” chapter 11 petition. “Winken” Ex. No. 1, p. 7; “Winken” Ex. No. 3.
45. At a time when Wayne knew that “Sleepytime’s” unpaid Illinois tax liability was approximately \$61,000, “Sleepytime” reported in its chapter 11 petition that it had approximately 5.95 million dollars in total assets and approximately 5.685 million dollars in total liabilities. “Winken” Ex. No. 1, p. 3.
46. After Wayne had actual personal knowledge of “Sleepytime’s” Illinois tax liabilities, and while purporting to have “made demand that all taxes be paid and brought current [and to] pay no other bills” (“Winken” Ex. No. 5, p. 2 (question 25)), he signed “Sleepytime” checks to pay salaries to himself and to his brother Alan, and allowed “Sleepytime” to pay other corporate debts and liabilities. “Winken” Ex. No. 1, pp. 18, 24-42; “Winken” Ex. No. 5, p. 2 (question 31); *see also* Tr. p. 366 (“Hodges”).
47. After he had personal knowledge of “Sleepytime’s” Illinois tax liabilities, Wayne signed a contract pursuant to which “Sleepytime” sold corporate assets for a purchase price in excess of one million dollars, and did not pay “Sleepytime’s” Illinois tax debts/liabilities with the proceeds. “Winken” Ex. No. 8 (Asset Purchase Agreement), pp. 3, 15.
48. “XYZ” Properties (“XYZ”) was a partnership whose partners were Wayne and Alan “Blinken” and their father. Each partner owned one-third interest in the partnership. Tr. p. 226 (A. “Blinken”). “XYZ” owned the real property in and on which “Sleepytime” conducted business, and “XYZ” leased that property to “Sleepytime” for \$15,000.00 per month. *See* Tr. p. 227 (A. “Blinken”). “XYZ’s” principle and interest obligation for that property was approximately \$8,000 or \$9,000 per month. Tr. pp. 227-28 (A. “Blinken”).
49. After he had personal knowledge of “Sleepytime’s” Illinois tax liabilities, and both before and after “Sleepytime” filed its bankruptcy petition, Wayne authorized “Sleepytime’s” payment of \$22,000 to

“XYZ” Properties. “Winken” Ex. No. 1, p. 24 (10/8/91 payment of \$7,000 and 10/31/91 payment of \$15,000); Tr. pp. 203-04 (A. “Blinken”).

50. After he had personal knowledge of “Sleepytime’s” Illinois tax liabilities, and both before and after “Sleepytime” filed its bankruptcy petition, Wayne continued to draw a salary from “Sleepytime”. *See* “Winken” Ex. No. 1, p. 18 (question 21); Tr. p. 366 (“Hodges”).

**Facts Regarding Alan “Blinken”’s Responsibilities, and His Activities Relative to “Sleepytime’s” Unpaid ROT Liability and Unpaid Use Tax Debt:**

51. Alan “Blinken”’s duties as Vice President for “Sleepytime” involved the sales and marketing of “Sleepytime’s” products and services. “Winken” Ex. No. 6; Tr. p. 181 (A. “Blinken”). Specifically, Alan described his responsibilities as: “primarily the sale of new and used equipment, leasing of the equipment, the rental, and then the peripheral profit centers, which ... [were] parts and service of customer-owned equipment.” Tr. p. 181 (A. “Blinken”).
52. “Sleepytime” sales and rental personnel reported to Alan, and he reported to Wayne. “Winken” Ex. No. 6, p. 1 (question 4). “Winken” reported to Alan regarding “Sleepytime’s” service operations. *See id.*; Tr. p. 181 (A. “Blinken”).
53. Alan was aware, during the early part of 1991, that “Sleepytime” had cash flow problems. Tr. pp. 184, 239 (A. “Blinken”). Specifically, Alan knew that “Sleepytime” was on a c.o.d. basis with its principal supplier, Nissan (*see id.* p. 184), and he knew that a bank at which “Sleepytime” held a line of credit had accelerated the schedule of “Sleepytime’s” payments thereunder. Tr. p. 191 (A. “Blinken”).
54. In approximately 1981 or 1982, Alan paid tax delinquencies regarding another company, “Sleepytime” North, in which he held an ownership interest with his brother Wayne. *See* Tr. pp. 184-86 (A. “Blinken”). At hearing, Alan described that experience as a reason why he and his brother had instituted an explicit debt payment policy for “Sleepytime” employees to follow. Tr. pp. 186, 237, 239 (A. “Blinken”). That policy was that taxes would be paid first, insurance second, payroll third, and then “Sleepytime’s” vendors. *Id.*; *see also* “Winken” Ex. No. 6, p. 2 (questions 15, 25).

55. Alan had personal knowledge that “Sleepytime” had chronic problems maintaining up-to-date books and records. Tr. pp. 240-43 (A. “Blinken”). When Alan wanted to check up on “Sleepytime’s” cash-flow problems, he would ask “Winken” instead of trying to read or review “Sleepytime’s” books and records. Tr. pp. 237-44, 251-52 (A. “Blinken”).
56. While Alan was not personally involved in the preparation of “Sleepytime’s” sales tax returns during the period from 3/91 to approximately 10/91 (Tr. p. 175 “Quitecontrary”), he would regularly ask “Winken” whether the tax due on those returns, as well as other corporate debts, had been paid. Tr. p. 236-37, 257 (A. “Blinken”); *see also* “Winken” Ex. No. 6, p. 1 (question 4).
57. Alan testified that he first gained personal knowledge of “Sleepytime’s” Illinois tax delinquencies on the day a meeting was held at “Sleepytime’s” offices. Tr. pp. 186-88, 236 (A. “Blinken”); “Winken” Ex. No. 6, p. 2 (question 15b).
58. Although Alan testified that the decision to file for bankruptcy relief was made following the meeting held on October 4, 1991, he signed the petition for chapter 11 relief as “Sleepytime’s” representative on September 7, 1991. “Winken” Ex. No. 1, p. 2.
59. Even though Alan helped to make and implement “Sleepytime’s” policy regarding the hierarchy of corporate dept payments (*see* Tr. pp. 186, 237, 239 (A. “Blinken”)), when “Sleepytime” was experiencing cash flow problems, Alan personally sought to prioritize “Sleepytime’s” payments of available cash to manufacturers of the products Alan was in charge of selling. Tr. pp. 218-19 (A. “Blinken”).
60. After he had personal knowledge of “Sleepytime’s” Illinois tax debts/liabilities, Alan signed a contract pursuant to which “Sleepytime” sold corporate assets for a purchase price in excess of one million dollars, and did not pay “Sleepytime’s” Illinois tax debts/liabilities with the proceeds. “Winken” Ex. No. 8, pp. 3 (Alan’s initials on the purchase price and purchase price payment provisions of the contract), 15 (Alan signed contract).
61. After he had personal knowledge of “Sleepytime’s” Illinois tax debts/liabilities, and both before and after “Sleepytime” filed its bankruptcy petition, Alan, as a one third partner in “XYZ” Properties,

received \$22,000.00 from “Sleepytime”. “Winken” Ex. No. 1, p. 24 (10/8/91 payment of \$7,000 and 10/31/91 payment of \$15,000).

62. After he had personal knowledge of “Sleepytime’s” Illinois tax debts/liabilities, and both before and after “Sleepytime” filed its bankruptcy petition, Alan continued to draw a salary from “Sleepytime”. *See* “Winken” Ex. No. 1, p. 18 (question 21); *see also* Tr. pp. 365-66 (“Hodges”).

### **Conclusions of Law:**

“Sleepytime’s” underlying corporate tax liability consists of the debt owed to the State of Illinois in the amount of use tax it collected from customers during the applicable periods (35 ILCS 105/8, *formerly* Ill. Rev. Stat. ch. 120, ¶ 439.8), and/or its corresponding unpaid retailers’ occupation tax liability, as measured by the taxable gross receipts it received from transactions during the applicable periods. 35 ILCS 120/2 (*formerly* Ill. Rev. Stat. ch. 120, ¶ 442); Sweis v. Sweet, 269 Ill. App. 3d 1, 6 (1<sup>st</sup> Dist. 1995) (“The exact amount of [a § 13½ penalty] liability is based on either (1) the final or revised final assessment, or (2) the corporate taxpayer’s return filed with the Department.”).

In pertinent part, section 13½ provides:

Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon[.] The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be *prima facie* correct and shall be *prima facie* evidence of a penalty due under this Section. Proof of such determination by the Department shall be made at any hearing before it or in any legal proceeding by reproduced copy of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or any legal proceeding and shall be *prima facie* proof of the correctness of the penalty due, as shown thereon.

Ill. Rev. Stat. ch. 120, ¶ 452½ (1991).

The Department established its *prima facie* case when it introduced the Notices of Penalty Liability at hearing. Branson v. Department of Revenue, 168 Ill. 2d 247, 257-58 (1995). Moreover, the evidence adduced

at hearing show that, at different times, each of the three individuals named in the NPL's had personal knowledge that "Sleepytime" had collected tax monies from its customers and owed ROT as measured by the receipts "Sleepytime" received from such transactions. Thereafter, each individual either failed to file the returns prepared regarding "Sleepytime's" transactions, and/or failed to pay over the tax monies "Sleepytime" collected, or "Sleepytime's" corresponding amount of ROT liability, to the Department.

Until early October of 1991, Richard "Winken" was given "Sleepytime's" completed monthly sales tax returns and the checks drawn to pay the tax due. *See* "Blinken" Ex. Nos. 3-7; Tr. p. 360 ("Hodges"). That "Winken" had custody or possession of the returns from the time they were prepared to the time they were collected by "Hodges" prior to the October 4<sup>th</sup> meeting is shown by the presence of "Winken"'s signature, or parts of it, on the returns that were ultimately filed regarding the months of March through August of 1991. "Blinken" Ex. Nos. 3-8; "Blinken" Group Ex. Nos. 9-1 through 9-9. "Hodges", moreover, testified that he retrieved drawn and unmailed checks from "Winken", but could not recall that he obtained stale instruments from anyone else. Tr. pp. 352-54 ("Hodges").

Additionally, during that same period of time, "Winken" had been signing "Sleepytime" checks drawn to pay prior Illinois sales and use tax delinquencies. "Blinken" Group Ex. Nos. 9-1, 9-4, 9-6 to 9-8. The evidence shows that, during the period from March through early October 1991, "Winken" was an officer of "Sleepytime" who had the responsibility for filing and paying "Sleepytime's" sales tax returns. During that time, and when "Winken" believed that "Sleepytime" did not have enough funds to honor the checks "Hodges" drew to pay "Sleepytime's" monthly ROT liabilities, "Winken" did not mail the returns or the checks to the Department. *See* Tr. p. 288 ("Winken"). I conclude that "Winken" willfully failed to file "Sleepytime's" returns prepared regarding the period from March through August 1991. Therefore, I conclude that "Winken" is responsible for a penalty equal to the unpaid corporate liabilities arising during those periods.

"Winken's" failure to file those returns, however, does not mean that "Blinken" and "Nod" were not also responsible for filing ROT returns and paying taxes shown to be due thereon for the same periods. Within the plain text of § 13½, the legislature acknowledged that more than one individual in a corporation may have "control, supervision or responsibility for filing returns and making payment[s of the tax due thereon] ...." Ill.

Rev. Stat. ch. 120, ¶ 452½ (“Any officer or employee ... [with such responsibility who willfully fails to file, pay or who willfully attempts to evade payment of the tax] ... shall be personally liable for a penalty ....”) (emphasis added). Moreover, and when reviewing whether an individual is subject to a § 13½ penalty, the Illinois supreme court has regularly referred to federal court decisions regarding § 6672 of the Internal Revenue Code (26 U.S.C. § 6672), which also imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees’ social security and federal income withholding taxes. See Branson v. Department of Revenue, 168 Ill. 2d 247, 261 (1995); Department of Revenue v. Heartland Investments, Inc., 106 Ill. 2d 19, 29-30 (1985); Department of Revenue v. Joseph Publick & Sons, Inc., 68 Ill.2d 568, 577 (1977).

A review of decisions interpreting § 6672 discloses facts courts find relevant when considering whether an individual is a “responsible person” under that provision. For example, the Seventh Circuit has described as the “key to liability” whether the individual enjoyed “significant control or authority over an enterprise’s finances or general decision-making.” Ruth v. United States, 823 F.2d 1091, 1094 (7<sup>th</sup> Cir. 1987). In Monday v. United States, 421 F.2d 1210 (7<sup>th</sup> Cir. 1970), the same court wrote:

Corporate office does not, *per se*, impose the duty to collect, account for and pay over the withheld taxes. On the other hand, an officer may have such a duty even though he is not the disbursing officer. [citations omitted] The existence of the same duty and concomitant liability in another official likewise has no effect on the taxpayer’s responsibility. Liability attached to those with power and responsibility within the corporate structure for seeing that the taxes withheld from various sources are remitted to the Government. **This duty is generally found in high corporate officials charged with general control over corporate business affairs who participate in decisions concerning payment of creditors and disbursement of funds.**

Monday, 421 F.2d at 1214-15 (emphasis added). Other courts have considered, for example: the duties of the individual officer as outlined by corporate by-laws; the individual’s ability to sign checks of the corporation; the identity of the officers, directors, and shareholders of the corporation; the identity of the individuals who hired and fired employees; and the identity of the individuals who were in control of the financial affairs of the corporation. *E.g.*, Silverberg v. United States, 524 F. Supp. 744, 747 (E.D.N.Y. 1981).

As the president of “Sleepytime”, Wayne “Nod” had the authority to supervise and control Richard “Winken’s” actions at all times. As vice-president, Alan “Blinken” had control over “Winken’s” activities as

part of his supervisory responsibilities over the service area or division of “Sleepytime’s” business. *See* Tr. p. 181 (A. “Blinken”). Together, Wayne and Alan owned all of the stock of “Sleepytime”. “Winken” Ex. No. 5-6; Tr. pp. 179-80 (A. “Blinken”). Both had the authority to write corporate checks and to authorize corporate payments to others. *See* “Winken” Ex. Nos. 5-6 (p. 3, question 31 of each exhibit). In early October, 1991, at the latest, Wayne “Nod” and Alan “Blinken” exercised their official control over “Winken” when they stripped him of any control or responsibilities regarding “Sleepytime’s” financial affairs, after they learned, *inter alia*, the extent to which “Sleepytime’s” state sales tax liabilities had become delinquent. “Winken” Ex. Nos. 5-6 (p. 2, question 25 of each exhibit).

Prior to the time they stripped “Winken” of authority to make financial decisions regarding “Sleepytime’s” affairs, both Wayne and Alan also had personal knowledge that “Sleepytime” had a serious cash flow problem. *Id.* In fact, the evidence offered at hearing suggests that “Sleepytime’s” cash flow problem was common knowledge to most senior “Sleepytime” personnel. *See* Tr. pp. 31 (“Hodges”), 130, 144, 147-48 (“Ketchup”), 239 (A. “Blinken”). The evidence shows, also, that every Illinois ROT return filed by “Sleepytime” from July 1990 through most of 1991 had been filed late. “Winken” Ex. No. 4 (returns filed regarding July through November of 1990 were filed on or about 1/15/91; return for 12/90 was filed on or about 2/11/91, return for 1/91 was filed on or about 5/17/91 was filed on or about 5/17/91, and return for 2/91 was filed on or about 6/14/91); “Blinken” Ex. Nos. 3-9 (returns for 3/91 through 11/91 were filed in 12/91).

Despite Alan “Blinken’s” and “Hodges” claims at hearing,<sup>4</sup> no one in a position of authority over “Sleepytime’s” financial affairs should have been shocked to learn that, as of October 1991, “Sleepytime” had delinquent ROT liabilities. By the date of the October 4<sup>th</sup> meeting, it should have been clear that — for more than a year — “Sleepytime” had neither filed an ROT return on time, nor timely paid over to the Department

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<sup>4</sup> Unless “Hodges” was consciously attempting to remain ignorant regarding “Sleepytime’s” ROT returns after he stopped signing them, I find “Hodges” claim that he first learned in 10/91 that “Sleepytime’s” March through July returns 1991 had not been filed, incredible. The books and records admitted at hearing show that “Hodges” had personal knowledge, or at least, ample evidence to suspect — months before 10/91 — that “Sleepytime” was neither filing ROT returns, nor paying the liabilities as shown on such returns, in a timely manner. *See, e.g.*, “Winken” Ex. No. 2, “Winken” Ex. No. 4; “Blinken” Group Ex. No. 9-1 through 9-9.



either the use taxes it collected or its own corresponding ROT liabilities. “Winken” Ex. Nos. 2, 4; “Blinken” Group Ex. Nos. 9-1 through 9-9; “Winken” Ex. Nos. 5-6.

Once both Wayne and Alan had personal knowledge that “Sleepytime” had not filed returns since the return due regarding February 1991 (which was filed on or about June 11, 1991, *see* “Winken” Ex. No. 4), Wayne signed the delinquent returns — over Richard “Winken”’s signature — and filed them with the Department. *See* “Blinken” Ex. Nos. 3-9. However, and even though both Wayne and Alan stated in writing that each “demand[ed] that all ... taxes be paid ...” once he learned of “Sleepytime’s” various tax delinquencies (*see* “Winken” Ex. Nos. 5-6 (p. 2, question 25 of each exhibit)),<sup>5</sup> the tax due as shown on “Sleepytime’s” ROT returns was never paid. *See* Department Ex. No. 1.

In Branson, the Illinois Supreme Court noted that a “‘responsible officer’ ... was obligated by law to cause the filing of ... returns and the payment of the retailers’ occupation taxes ... [and was] a steward of the collected ... taxes that customers of the [corporation] paid at the point of sale.” Branson v. Department of Revenue, 168 Ill. 2d at 259 (*citing* Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill. 2d 568 (1977)). The court also wrote: “if a responsible officer uses collected retailers’ occupation taxes to pay other creditors of the corporation, while knowing that he or she was obligated to file the returns and remit the taxes, the willful element of section 13½ is satisfied.” Branson, 168 Ill. 2d at 259.

By the time the October 4<sup>th</sup> meeting was held, “Hodges” had already collected the delinquent “Sleepytime” sales tax returns prepared, as well as the checks that had been drawn, but never mailed, for the periods from March through July of 1991. Tr. pp. 122-24 (“Hodges”). From a checklist he prepared, “Hodges” informed those present at the meeting of, *inter alia*, the amount and the nature of the tax then known to be delinquent. “Winken” Ex. 3; Tr. pp. 124, 351-52, 354-60 (“Hodges”). When Wayne and Alan stripped

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<sup>5</sup> While Alan did not sign the returns that were ultimately filed with the Department, it should be recalled that only Wayne signed “Sleepytime’s” payroll checks. “Winken” Ex. Nos. 5-6 (p. 3, question 31 of each exhibit). Yet both Wayne and Alan assumed personal responsibility for (i.e., they both paid) “Sleepytime’s” federal withholding tax delinquencies. Tr. pp. 206, 213 (A. “Blinken”); *see also* Monday v. United States, 421 F.2d at 1213-15 (a president of a corporation who did not sign or personally participate in the preparation of corporation’s tax returns was nevertheless found to be a responsible person under § 6672, although the court remanded for a new trial the issue of the president’s willful failure to pay the taxes due).

“Winken” of his financial duties, they assumed personal control, supervision and responsibility for the filing of “Sleepytime’s” sales tax returns and the payment of the taxes they knew were due.

After Wayne had actual and personal knowledge of “Sleepytime’s” ROT delinquencies, and before Wayne and Alan jointly decided to use almost all of “Sleepytime’s” available funds — some of which funds may well have come from the tax monies it had already collected from customers — as a retainer for its bankruptcy counsel, Wayne authorized “Sleepytime’s” payments to himself as a one-third partner in “XYZ” Properties. “Winken” Ex. No. 1, pp. 7 (¶ 4 of “Sleepytime’s” Motion of Debtor in Possession for Authorization to Retain Counsel), 24 (“Sleepytime’s” \$7,000 payment to “XYZ” on 10/8/91). Wayne authorized further corporate payments to his family partnership after “Sleepytime’s” petition was filed. *Id.*, p. 24 (10/31/91 payment of \$15,000). Additionally, Wayne continued to draw a salary from “Sleepytime”, and continued to authorize payments of other corporate obligations, without arranging to pay “Sleepytime’s” outstanding Illinois use tax debt or its ROT delinquencies. *See* Tr. p. 366 (“Hodges”).

After he had personal knowledge of “Sleepytime’s” Illinois tax debts/liabilities, Alan also signed the contract pursuant to which “Sleepytime” sold corporate assets for a purchase price in excess of one million dollars, and did not pay “Sleepytime’s” Illinois tax debts/liabilities with the proceeds. “Winken” Ex. No. 8, pp. 3 (Alan’s initials on the purchase price and purchase price payment provisions of the contract), 15 (Alan signed contract). Both before and after “Sleepytime” filed its bankruptcy petition, Alan, as a one third partner in “XYZ” Properties, received \$22,000.00 from “Sleepytime”. “Winken” Ex. No. 1, p. 24. Despite his statements to the bankruptcy court (*see* “Winken” Ex. No. 6, p. 2 (¶ 25); Tr. p. 209 (A. “Blinken”)), Alan accepted “Sleepytime’s” funds as rent, instead of directing that such monies be turned over to the Department. Alan also continued to draw a salary from “Sleepytime”. *See* “Winken” Ex. No. 1, p. 18 (question 21); *see also* Tr. pp. 365-66 (“Hodges”).

Alan “Blinken” and Wayne “Nod”’s decisions to pay other corporate creditors, including themselves, with “Sleepytime” funds, instead of remitting the monies or amounts “Sleepytime” collected from its customers, were decisions made after they both had actual personal knowledge of the corporation’s outstanding Illinois tax debts and corresponding delinquencies. Their status as senior corporate officers, directors and 100%

shareholders of “Sleepytime”, Ltd., and their actions, show that they had control, supervision or responsibility for filing “Sleepytime’s” sales tax returns and paying the taxes due thereon. Their failure to pay the tax they knew to be due was willful.

**Conclusion:**

I recommend that NPL number 0009 be revised to include only the amounts of tax, penalty and interest regarding unpaid corporate assessments arising during the periods beginning 3/91 through 8/91 (which return would have been due in late September 1991). That NPL should be finalized as revised, with interest to accrue pursuant to statute. I recommend that NPL numbers 0007 and 0008 be finalized as issued, with interest to accrue pursuant to statute.

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Date

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Administrative Law Judge



**Illinois Department of Revenue  
OFFICE OF ADMINISTRATIVE HEARINGS**

James R. Thompson Center  
100 West Randolph Street, Level 7-900  
Chicago, Illinois 60601  
(312) 814-3070

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<b>THE DEPARTMENT OF REVENUE</b>	)	
<b>OF THE STATE OF ILLINOIS</b>	)	
v.	)	Docket No. 96-ST-0034
<b>RICHARD "WINKEN", ALAN "BLINKEN",</b>	)	NPL Nos. 5447 (A.
"Blinken")		
<b>and the ESTATE of WAYNE "BLINKEN",</b>	)	5448 (W.
"Blinken")		
<b>responsible officers of Power Lift, Ltd.</b>	)	5449 (R.
"Winken")		
Taxpayers	)	

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**NOTICE OF DECISION**

TO: Alan Osheff	Richard Manning
Illinois Department of Revenue	Burman and Manning
100 West Randolph Street 7 <sup>th</sup> Fl.	135 South LaSalle Street Ste. 2512
Chicago, Illinois 60601	Chicago, Illinois 60603

John Flynn  
330 West Irving Park Road  
Wood Dale, Illinois 60191-1320

**YOU ARE HEREBY NOTIFIED** that the attached recommended decision of the Administrative Hearings Division of the Illinois Department of Revenue in the above entitled cause has been accepted by the Director as dispositive of the issues therein. This recommendation is now a final administrative decision and establishes your rights or responsibilities regarding the subject matter of the hearing. Should this decision be adverse to you, you may pursue your rights to administrative review by filing a complaint in the Circuit Court under the requirements of 735 ILCS 5/3-101 *et seq.*, within 35 days of the date of service of this notice.

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Date of Decision

Kenneth E. Zehnder, Director  
Illinois Department of Revenue